

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Friday, January 14, 2022

Hearing Room 1568

2:30 PM

2:22-10132 Phenomenon Marketing & Entertainment, LLC

Chapter 11

#1.00 HearingRE: [7] Motion to Reject Lease or Executory Contract (Berger, Michael)

Docket 7

Tentative Ruling:

1/13/2022

Note: Parties must appear by telephone. The courtroom is undergoing renovation. To make a telephonic appearance, parties should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Subject to any opposition which may be presented at the hearing, the Court is prepared to authorize the Debtor to reject the Lease, with rejection taking effect as of the Petition Date.

Pleadings Filed and Reviewed:

- 1) Notice of Motion and Motion to Reject Non-Residential Lease with 5900 Wilshire LLC, First Amendment to the Wilshire Lease, Second Amendment to the Wilshire Lease, and the Three Sublease Agreements to the Wilshire Lease Pursuant to 11 U.S.C. § 365 [Doc. No. 7] (the "Motion")
 - a) Order Setting Hearing on Debtor's Motion to Reject Commercial Property Lease [Doc. No. 5]
 - b) Declaration of Sofya Davtyan Regarding Telephonic and E-mail Notice [Doc. No. 8]
- 2) Opposition may be presented at the hearing

I. Facts and Summary of Pleadings

On January 10, 2022 (the "Petition Date"), Phenomenon Marketing & Entertainment, LLC (the "Debtor") filed a voluntary Chapter 11 petition and elected treatment under Subchapter V. On January 10, 2022, the United States Trustee appointed Susan K. Seflin as the Subchapter V Trustee. Doc. No. 10. The Debtor is a marketing agency. The filing of the petition was precipitated by a decline in the Debtor's net revenue from approximately \$22 million in 2019 to approximately \$13 million in 2020. The Debtor projects that net revenue for 2021 will be approximately

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\$13 million.

The Debtor leases commercial office space (the "Leased Premises") from 5900 Wilshire, LLC (the "Lessor"). The Leased Premises are located on the 28th and 29th floors of an office building located at 5900 Wilshire Blvd., Los Angeles, CA. The original lease agreement was executed in March 2013 but was subsequently amended (the "Lease"). Payments due under the Lease exceed \$100,000 per month.

The Debtor vacated the Leased Premises in March 2020 as a result of the Covid-19 pandemic, but continued to make payments under the Lease until March 2021. Payments made by the Debtor after vacating the Leased Premises total \$1,147,705.58. According to the Debtor's schedules, the Lessor holds a contingent, disputed, and unliquidated claim of \$1,468,463.50 on account of "[d]elinquent rent, including the utilities, property tax, and deferred rent." Schedule E/F [Doc. No. 1] at ¶ 3.1.

The Debtor seeks authorization to reject the Lease, effective as of the Petition Date. The Debtor seeks rejection in order to avoid incurring administrative rent for office space that it no longer uses.

Because this matter is being heard on an emergency basis, opposition to the Motion may be presented at the hearing.

II. Findings of Fact and Conclusions of Law

Section 365(a) provides that the Debtor, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." In *Agarwal v. Pomona Valley Med. Grp. (In re Pomona Valley Med. Grp., Inc.)*, the Ninth Circuit explained that the business judgment rule governs the Bankruptcy Court's review of a debtor's decision to assume or reject an executory contract or unexpired lease. *Pomona Valley*, 476 F.3d 665, 670 (9th Cir. 2007). The *Pomona Valley* court stated that the Court "need engage in only a cursory review" of the debtor's decision, and "should presume that the debtor-in-possession acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate." *Id.*

Under § 365(d)(3), the Debtor is required to "timely perform all obligations ... arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title."

The Court finds that rejection of the Lease is in the best interests of the estate. The Debtor no longer uses the Leased Premises to operate its business. Absent rejection of

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the Lease, the Debtor would accrue administrative expenses in excess of \$100,000 per month.

The Court must next determine whether rejection of the Lease should be effective as of the Petition Date, or as of the date of the entry of the order granting the Motion. The Ninth Circuit has held that in appropriate circumstances, the Court may authorize the retroactive rejection of a nonresidential real property lease. *Pacific Shores Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1065 (9th Cir. 2004). If the Court does not authorize rejection as of the Petition Date, the estate would be obligated to make lease payments for the Premises at the contractual rate for the period between the Petition Date and the effective date of rejection. *See* § 365(d)(3); *see also At Home Corp.*, 392 F.3d at 1068 (stating that "§ 365(d)(3) makes clear that the [estate representative] must perform all obligations owing under a lease—particularly the obligation to pay rent at the contract rate—until the lease is rejected").

Retroactive rejection of a Lease is justified only under "exceptional circumstances." *At Home*, 392 F.3d at 1072. Factors the Court may consider in determining whether the requisite exceptional circumstances exist include (1) the absence of delay in seeking rejection, (2) the vacancy of the leased premises, and (3) the landlord's conduct and motive in opposing retroactive rejection. *Id.* at 1072–75.

Here, exceptional circumstances are present warranting rejection of the Lease retroactive to the Petition Date. The Debtor acted promptly, seeking retroactive rejection only two days after the Petition Date (factor one). The Debtor is not currently occupying the Leased Premises and has not occupied the Leased Premises since March 2020 (factor two).

With respect to the third factor, it is not known at the present time whether the Lessor will oppose retroactive rejection because the Motion was filed on an emergency basis. However, the only basis for the Lessor to oppose retroactive rejection would be a desire to obtain administrative rent. Here, retroactive rejection imposes minimal prejudice upon the Lessor. Absent retroactive rejection, the Lessor would be entitled to administrative rent only for the four-day period between January 10, 2022 (the Petition Date) and January 14, 2022 (the date of the hearing on the Motion). The minimal prejudice that the Lessor would suffer from being deprived of administrative rent over this short period is offset by the Lessor's security deposit, which according to the Debtor's schedules is in the amount of \$113,279.87. Schedule A/B: Assets—Real and Personal Property at ¶ 7.1 [Doc. No. 1].

For these reasons, the Court is prepared to authorize the Debtor to reject the Lease retroactive to the Petition Date.

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III. Conclusion

Subject to any opposition which may be presented at the hearing, the Court is prepared to authorize the Debtor to reject the Lease, with rejection taking effect as of the Petition Date.

Party Information

Debtor(s):

Phenomenon Marketing &

Represented By
Michael Jay Berger